IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
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No. 01-6978

GARY A. EWING, Petitioner,

v.

STATE OF CALIFORNIA

On Writ of Certiorari to the California Court of Appeal, Second Appellate District

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether a sentence of life with the possibility of parole after twenty-five years for a felony recidivist convicted of grand theft amounts to "cruel and unusual punishment."

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RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

In 1984, petitioner Gary Ewing was convicted of grand theft in Ohio. Later, between 1988 and 1993, petitioner suffered a series of criminal convictions in California for eight misdemeanors, including battery and unlawful possession of a firearm. These convictions resulted in several periods of incarceration in jail and terms of probation. J.A. 4-6, 13-14.

Next, in a prosecution arising from crimes committed on three separate dates in Long Beach in 1993, a jury convicted petitioner of three counts of first-degree residential burglary and one count of first-degree residential robbery. J.A. 6, 8-10; Clerk's Tr. 85. For sentence-enhancement purposes, see Cal. Penal Code § 12022(b), the jury found that petitioner personally had used a knife in committing one of the

burglaries and the robbery connected to it. See Clerk's Tr. 87. The court sentenced petitioner to state prison for a term of nine years, eight months. *Id.*

In 1994, the California Legislature, by votes of 29-7 in the Senate and 63-9 in the Assembly, enacted the "Three Strikes and You're Out" felony-recidivist sentencing law. Cal. Penal Code § 667(b)-(i). Later that year, California voters adopted, by 72-28 percent in a statewide initiative election, a virtually-identical version of the "Three Strikes" law. *Id.* § 1170.12. Under "Three Strikes," a repeat felony offender previously convicted of a "serious" or "violent" felony, as elsewhere defined in the Penal Code,[1/] receives a doubled prison sentence for any new felony conviction. *Id.* §§ 667(e)(1), 1170.12(c)(1). A repeat felon with two or more prior convictions for "serious" or "violent" felonies receives a prison sentence of at least twenty-five years to life for any new felony conviction. *Id.* §§ 667(e)(2), 1170.12(c)(2).

Petitioner was paroled from prison for the Long Beach crimes in June 1999. J.A. 6, 14. While still on parole ten months later, in April 2000, petitioner entered The Pro Shop at a golf course in El Segundo. After purchasing a bucket of golf balls, petitioner lingered inside the shop. Then he stole three golf clubs, with a total retail value of approximately $1,200, hiding them in the legs of his pants. Police officers in the parking lot outside the shop saw petitioner remove the

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[1/] "Violent" or "serious" felonies, as defined in the "Three Strikes" law by reference to partially overlapping sections 667.5 and 1192.7 of the California Penal Code, include crimes such as murder; attempted murder; voluntary manslaughter; mayhem; arson; first-degree burglary; robbery; grand theft involving a firearm; kidnapping; carjacking; rape; lewd or lascivious act on a child under the age of fourteen; continuous sexual abuse of a child; furnishing heroin, cocaine, or PCP to a minor; and any felony or attempt to commit a felony otherwise punishable by death or life imprisonment. The full text of current sections 667.5 and 1192.7 are set out in Appendix A to this brief.

clubs from his pants, and arrested him on the spot. Rep. Tr. 346-365, 382-389.

The state charged petitioner with one count of felony burglary and one count of felony grand theft of personal property worth in excess of $400. Clerk's Tr. 25-26; see Cal. Penal Code §§ 459-461, 484, 489. The prosecutor formally alleged, as required by the "Three Strikes" law, §§ 667(g), 1170.12(e), that petitioner had previously sustained the four prior "serious" or "violent" felony convictions for the 1993 burglaries and robbery in Long Beach. Clerk's Tr. 25-26. A jury acquitted petitioner on the new burglary count, but convicted him of grand theft. *Id.* at 80-81. In a bifurcated portion of the trial, the judge found that petitioner indeed had suffered the four prior felony convictions. *Id.* at 90; Rep. Tr. 1201-1209.

At the sentencing hearing, petitioner asked the judge to invoke a mechanism, provided by a state statute, to reduce the grand-theft conviction to that of a misdemeanor. J.A. 9; see Cal. Penal Code § 17(b). Reducing the conviction to a misdemeanor would have avoided "Three Strikes" sentencing, for the latter is triggered only by a new conviction for a felony. *Id.* §§ 667(d)(1), 1170.12(b)(1); see *People* v. *Superior Court (Alvarez)*, 14 Cal. 4th 968, 979, 60 Cal. Rptr. 2d 93, 928 P. 2d 1171 (1997). Petitioner also asked the judge to "strike," in the exercise of discretion also allowed under state law, some or all of the prior-conviction findings. J.A. 9; see Cal. Penal Code § 1385; *People* v. *Superior Court (Romero)*, 13 Cal. 4th 497, 529-532, 53 Cal. Rptr. 2d 789, 917 P. 2d 628 (1996); *People* v. *Garcia*, 20 Cal. 4th 490, 499-500, 85 Cal. Rptr. 2d 280, 976 P. 2d 831 (1999). Striking three of the four prior-conviction findings would have resulted only in a doubled prison sentence for the grand theft. Cal. Penal Code §§ 667(e)(1), 1170.12(c)(1). Striking all of the prior-convictions findings would have allowed the judge

to impose an ordinary prison sentence of up to four years. *Id.* §§ 17, 18, 486-487, 667.5(b).

Before deciding on the sentence, the judge stated that she had read the file in petitioner's Long Beach case, and she discussed some of the underlying facts of that case—e.g., the nighttime nature of one of the burglaries while the victim was at home, petitioner's use of the knife,[2/] and the sequence of offenses on three separate days. J.A. 8, 9, 11, 13. The judge also took note of petitioner's entire felony and misdemeanor record and the timing of his latest offense while on parole from prison. *Id.* at 13-14. And, she heard defense counsel's arguments and a plea from petitioner himself. *Id.* at 9-13.

In the end, the judge determined that the grand theft should remain a felony and be punished accordingly, and that the prior-conviction findings should stand, leaving petitioner subject to "Three Strikes" sentencing. J.A. 13-15. As a

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[2/] Petitioner's brief asserts that he "did not use" a knife in the prior burglary-robbery. (Pet. Br. 6.) But, as noted above, there was a formal finding in that case that he had done so. See Clerk's Tr. 87. And the reporter's transcripts in petitioner's Long Beach preliminary hearing and trial, lodged with this Court by respondent in connection with this case, discloses that the victim in the burglary-robbery testified that petitioner had drawn a knife and threatened him. L.A. Superior Ct. Case NA018343-01, Rep. Tr. 113; see *id.* Clerk's Tr. 7-9, 18. The brief of amicus curiae Families Against Mandatory Minimums is also incorrect insofar as it indicates that petitioner's burglary became a robbery because he had used a knife. (FAMM Br. 8 at n. 4.) Petitioner committed burglary upon entering a residence with intent to steal; he committed robbery by stealing property by force or fear from the person of the victim. See Cal. Penal Code §§ 211, 459. Although petitioner is correct in saying that the court "stayed" his sentence on the robbery-related burglary under section 654 of the California Penal Code (Pet. Br. 6, n. 5), that does not mean he committed only one offense; section 654 sweeps more broadly than its literal language to prohibit multiple punishment for multiple crimes if committed during an indivisible transaction. See *Neal* v. *California*, 55 Cal. 2d 11, 18, 9 Cal. Rptr. 607, 357 P. 2d 839 (1960).

newly-convicted felon with two or more "serious" or "violent" felony convictions in his past, petitioner was sentenced to state prison for an indeterminate term of life with the possibility of parole after twenty-five years. *Id.* The judge dismissed a further sentence-enhancement finding, one based upon petitioner's service of a prior prison term, see Cal. Penal Code § 667.5(b), that otherwise would have added one more year to petitioner's minimum prison term. *Id.* at 14.

The California Court of Appeal, in an unpublished opinion, upheld the conviction and sentence against petitioner's claims that the court had abused its sentencing discretion and that the sentence amounted to unconstitutional "cruel and unusual punishment." App. to Pet. for Cert. 28-30. The California Supreme Court denied discretionary review. *Id.* at 33.

SUMMARY OF ARGUMENT

This Court's Eighth Amendment jurisprudence restricts the judiciary's power to override criminal sentences prescribed by the state legislatures. Courts generally must defer to legislative policy choices in the fixing of sentences in a federal system of fifty states because, first, the Constitution does not dictate adherence to any particular penological theory. Second, it is difficult for a court to identify objective reasons, as opposed to a judge's own subjective policy preferences, that convincingly may demonstrate that a sentence endorsed by the people's elected representatives is nevertheless extreme and grossly disproportionate to the evils it is designed to redress.

Deference to the legislature's sentencing policies should be at its zenith in this case for many reasons. Most important, this is a case of felony recidivism. It is problematic enough for courts to balance the seriousness of given offenses with the degree of punishment. But it is especially perilous for any

court to attempt to re-determine—in conflict with elected legislators—the weight to be ascribed to the problem of repeated commission of felonies by a class of offenders who, as experience has shown, are responsible for criminal activity greatly disproportionate to their numbers. A judge's proffered explanation for doing so runs a heightened risk of being, and being perceived as, little more than the substitution of his or her preferences for those of the people and their elected policymakers.

Given that deference, the basic features of California's "Three Strikes" law provide assurances that the sentences it mandates are not "extreme" and "grossly disproportionate" to crimes committed by recidivists. The California statute relies, fundamentally, on traditional classifications of certain crimes as felonies. Equally important, it further narrows the class of offenders subject to its operation to felony recidivists who already have committed multiple felonies of a heightened serious or violent nature. New felonies committed by such offenders pose a special threat to the community because those criminals have demonstrated both their willingness to commit serious or violent crimes and also their continuing incorrigibility. The people of a state, of course, charge their elected representatives with the responsibility of assessing the weight of this threat, in light of myriad local variables, and prescribing a sentencing scheme that properly accounts for public safety.

Moreover, because the "Three Strikes" sentence imposed in this case allows for the possibility of parole, there is all the more reason for courts to stay their hand and defer to the people and their legislators. As this Court has recognized in considering Eighth Amendment challenges to imprisonment for crimes, courts generally lack objective criteria for drawing constitutional lines between one term of years and another. It is not surprising, then, that this Court has never overturned a prison sentence, on account of its duration alone, if

imprisonment for the offense was permissible at all and the sentence allowed a possibility of parole.

Finally, although the life sentences prescribed by the "Three Strikes" law become mandatory when the defendant finally has been adjudged a felon with two prior serious or violent "strikes," California law preserves opportunities for the sentencing court, in making certain preliminary determinations based on guided discretion, to impose a lesser sentence instead. This opportunity for leniency provides a further guarantee against a "grossly disproportionate" sentence in violation of the Constitution.

In light of all these features, petitioner's "Three Strikes" sentence of life imprisonment, with eligibility for parole after twenty-five years, is proportionate to his felony grand-theft conviction as aggravated by his prior serious felony convictions for residential burglary and robbery. This Court has upheld similar life-with-parole punishment for recidivism involving only non-violent felonies; and it has upheld the harsher sentence of imprisonment for life, without possibility of parole, for a first-time offense of possessing cocaine. In light of these precedents, and given the deference courts should accord to the state legislatures in the fixing of prison sentences for felony recidivists, the Court should uphold petitioner's sentence in this case too.

ARGUMENT

A SENTENCE OF LIFE IMPRISONMENT WITH THE POSSIBILITY OF PAROLE, IMPOSED UPON A RECIDIVIST FOR A NEW FELONY CONVICTION, IS NOT "CRUEL AND UNUSUAL PUNISHMENT"

In cases culminating in *Harmelin* v. *Michigan*, 501 U.S. 956 (1991), this Court has considered many challenges to the lengths of prison sentences under the Cruel and Unusual

Punishments Clause of the Eighth Amendment. E.g., *Solem* v. *Helm*, 463 U.S. 277 (1983); *Hutto* v. *Davis*, 454 U.S. 370 (1982) (per curiam); *Rummel* v. *Estelle*, 445 U.S. 263 (1980); *Badders* v. *United States*, 240 U.S. 361 (1916); *Graham* v. *West Virginia*, 224 U.S. 616 (1912); *McDonald* v. *Massachusetts*, 180 U.S. 311 (1901); see also *Weems* v. *United States*, 217 U.S. 349 (1910); *Robinson* v. *California*, 370 U.S. 660 (1962). The Court has never condemned as "cruel and unusual" any prison sentence offering at least a possibility of release on parole to a recidivist felony offender. Indeed, this Court has repeatedly recognized the logical and constitutional validity of dramatically enhanced sentences for felony recidivists. E.g., *Parke* v. *Raley*, 506 U.S. 20, 26-28 (1993); *Rummel*; *Spencer* v. *Texas*, 385 U.S. 554, 560 (1967); *Gryger* v. *Burke*, 334 U.S. 728 (1948); *Graham*, 224 U.S. at 631; *Moore* v. *Missouri*, 159 U.S. 673, 676-678 (1895).

Petitioner's sentence of twenty-five years to life is undoubtedly a long one. But it reflects a rational, graduated, and penologically-sound legislative response to the enhanced blameworthiness and substantial threat to public safety posed by serious or violent offenders who continue to commit felonies. Because petitioner has a record of prior serious or violent felonies and now has committed yet another felony—and also because he is promised a possibility of parole—petitioner's "Three Strikes" sentence is proportionate to his offense. And, certainly, his punishment is not so "grossly disproportionate" as to violate the Cruel and Unusual Punishments Clause.

A. A punishment of imprisonment can violate the Eighth Amendment only if it is an "extreme sentence" that is "grossly disproportionate" to criminal conduct.

1. In *Harmelin* v. *Michigan*, this Court's most recent consideration of the question of whether a prison sentence

might violate the Eighth Amendment because of its duration, the majority upheld a mandatory life-without-parole sentence for the crime of possessing 672 grams of cocaine. Justice Scalia's lead opinion, joined by the Chief Justice, broadly rejected the notion that the Eighth Amendment empowers courts to assess the "proportionality" of felony prison sentences. 501 U.S. at 994. As explained by Justice Scalia, neither the history nor the text of the Cruel and Unusual Punishments Clause provides a sufficient basis for permitting appellate review of the "proportionality" of felony criminal punishment outside the unique context of the death penalty. *Id.* at 966-985. Justice Scalia's opinion also concluded that, in any event, courts lack objective guidelines by which to second-guess legislative judgments about the appropriate length of sentences of imprisonment. *Id.* at 985-990.

A concurring opinion authored by Justice Kennedy, and joined by Justice O'Connor and Justice Souter, discerned from the Court's precedents a set of principles dictating tight restrictions on the scope of any judicial review of the "proportionality" of prison sentences. First, prison terms reflect substantive penological judgments generally within the province of legislatures rather than courts. 501 U.S. at 998. Second, the Constitution does not mandate adherence to any one penological theory. *Id.* at 999. Third, marked divergences in sentencing theories and in sentence lengths are inevitable, and often beneficial, in our federal system. *Id.* at 999. Fourth, proportionality review should be informed by "objective factors to the maximum possible extent," *id.* at 1000-1001; the "Court's Eighth Amendment judgments should neither be nor appear to be merely the subjective views of individual Justices," *Rhodes* v. *Chapman*, 452 U.S. 337, 346 (1981); *Davis*, 454 U.S. at 370. Those principles inform a final one: that the Constitution does not require "strict proportionality between crime and sentence," but instead forbids only "extreme" sentences that are "grossly

disproportionate" to the crime. *Harmelin*, 501 U.S. at 1001. Given these principles, the *Harmelin* concurrence re-affirmed what earlier opinions of this Court also had recognized: "Outside the context of capital punishment successful challenges to the proportionality of particular sentences are exceedingly rare." *Id.*; *Helm*, 463 U.S. at 291; *Rummel*, 445 U.S. at 272. Applying the Eighth Amendment's "narrow proportionality principle" in *Harmelin*, 501 U.S. at 997, the concurring opinion approved the mandatory life-without-parole sentence for the cocaine-possession offense on grounds that the sentence did not raise an initial inference of "gross disproportionality." Because the sentence raised no such inference, there was no justification for inquiring further into "intrajurisdictional" or "interjurisdictional" sentence comparisons. *Id.* at 1005; cf. *Solem* v. *Helm*, 463 U.S. at 290-293.

The dissenting opinion in *Harmelin* authored by Justice White concluded that the defendant's offense of simple possession of cocaine was not so dangerous as described in the concurring opinion. Comparing the sentence with others meted out in Michigan for different crimes, and with others prescribed in other states for the same crime, Justice White's dissent concluded that the severity of a life-without-parole sentence for possession of cocaine rendered it unconstitutionally cruel and unusual. 501 U.S. at 1018-1027. A dissent by Justice Stevens emphasized the death-penalty-like irrevocable nature of imprisonment for life without the possibility of parole. 501 U.S. at 1028-1029.

2. This Court has followed a general rule for such fragmented decisions, treating the concurring opinion supporting the judgment on the narrowest ground as representing the holding of the case. See *United States* v. *Marks*, 430 U.S. 188, 193 (1977). Under that test, the

principles set forth in Justice Kennedy's concurring opinion would constitute the true "rule" of *Harmelin*.[3/]

3. In the event, petitioner's sentence would remain constitutional under any of the *Harmelin* opinions. Under the analysis in Justice Scalia's opinion, petitioner's sentence in this case is clearly constitutional: Petitioner stands convicted of a crime properly classified and classifiable as a felony, and his punishment of imprisonment is non-capital in nature. No further inquiry, under Justice Scalia's and the Chief Justice's *Harmelin* view, is required.

As respondent will demonstrate in Section B, *post*, petitioner's sentence is neither "extreme" nor "grossly disproportionate" to his crime. Therefore, it is constitutional under Justice Kennedy's *Harmelin* test too.

Finally, as will be shown in Section C, *post*, intrajurisdictional and interjurisdictional comparisons would in fact only confirm the validity of petitioner's punishment.

[3/] Some Courts of Appeals have drawn that conclusion. E.g., *United States* v. *Hill*, 30 F.3d 48, 50 (6th Cir. 1994); *Henderson* v. *Norris*, 258 F.3d 706, 709 (8th Cir. 2001); *Andrade* v. *Attorney General of the State of California*, 270 F.3d 743, 754 (9th Cir. 2001), cert. granted sub nom. *Lockyer* v. *Andrade* (No. 01-1127); *United States* v. *Jones*, 213 F.3d 1253, 1261 (10th Cir. 2000); but see *Henry* v. *Page*, 223 F.3d 477, 482 (7th Cir. 2000) (concluding that *Solem* v. *Helm* remains the rule, but that "in non-capital felony convictions, a particular offense that falls within legislatively prescribed limits will not be considered disproportionate unless the sentencing judge has abused his discretion"); *United States* v. *Krastas*, 45 F.3d 63, 67 (4th Cir. 1995). To say that Justice Kennedy's opinion reflects the true *Harmelin* rule, however, is not to say that *Harmelin*, a non-recidivist case involving a life-without-parole sentence, "clearly established" or "dictated," in the special sense of those terms in habeas corpus cases, a rule of law for a recidivist, life-with-parole case. See *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000); *Butler* v. *McKellar*, 494 U.S. 407, 414-415 (1990) (rule of "controlling" case is not necessarily "dictated" by precedent for purposes of habeas corpus relief). Whether it did is an issue in *Lockyer* v. *Andrade* (No. 01-1127).

So, his sentence would survive scrutiny even under the comparative analyses endorsed by the *Harmelin* dissent.

B. Petitioner's sentence is not "grossly disproportionate," and therefore comports with the Eighth Amendment.

The Eighth Amendment is satisfied in this case because there is no sufficient basis for drawing even an initial inference that the severity of petitioner's sentence is "extreme" and "grossly disproportionate" to the seriousness of his crime as a repeat felon. See *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring). This may be seen in two distinct ways. First, the severity of petitioner's sentence, in light of his criminal record, is comparable to other sentences this Court has upheld in similar cases. Second, the basic characteristics of the California "Three Strikes" law—particularly its requirement of a new felony conviction by an offender with a history of prior serious felony convictions—cabins its application so that judicial deference to sentences imposed under the statute is warranted.

1. This Court previously has upheld comparable punishments for crimes that were not more serious than petitioner's.

a. Since 1980, this Court three times has upheld long prison sentences against Eighth Amendment challenges. In *Rummel* v. *Estelle*, the Court upheld a life-with-possibility-of-parole sentence for a repeat felony offender who had committed, in sequence, an $80 credit-card fraud, a $29 check forgery, and a $120 theft by false pretenses. 445 U.S. at 268-285. In *Hutto* v. *Davis*, the Court upheld a forty-year prison sentence—not even based upon recidivism—for possession and transfer of nine ounces of marijuana. 454 U.S.

at 370-374. Most recently, in *Harmelin* v. *Michigan*, the Court upheld a life-without-parole prison sentence for a first-time offense of possessing cocaine. 501 U.S. at 961, 996, 1009.

The Court did the same in two earlier cases. In *Graham* v. *West Virginia*, the Court upheld a recidivism-based life sentence for a defendant convicted, over time, for stealing a $50 horse, for entering a stable with intent to steal a horse, and for stealing another horse and accessories valued at $160. 224 U.S. at 620-621, 631. And, in *McDonald* v. *Massachusetts*, the Court upheld a twenty-five-year sentence for a recidivist convicted earlier of perjury and obtaining property by false pretenses, and then of forging and uttering a money order. 180 U.S. at 311-313.

b. Petitioner's "Three Strikes" felony record of recidivism—comprising prior convictions for burglaries and robbery and a new conviction for grand theft—is not demonstrably less serious than the array of crimes in either the modern case of *Rummel* or the older cases of *Graham* and *McDonald*. Nor is petitioner's record of such repeated felony convictions obviously less serious than the marijuana offenses in *Davis* or the cocaine-possession offense in *Harmelin*. Petitioner personally has demonstrated a propensity to commit burglary and robbery; and, despite prior convictions for those serious and violence-related offenses, he has now signaled his continuing incorrigibility by committing yet another felony. The threat to society posed by the conduct of a repeat offender like petitioner is at least similar in gravity to the unrealized threat posed by the cocaine-possessing defendant, with no prior convictions, who received a harsher sentence for the single offense in *Harmelin*.

Moreover, petitioner's sentence of an indeterminate life term with the possibility of parole after twenty-five years is reasonably comparable to the indeterminate life terms in *Rummel* and *Graham*, the forty-year term in *Davis*, and the

twenty-five-year term in *McDonald*. And it is categorically less severe than the life-without-parole sentence in *Harmelin*. Given *Rummel* especially, the constitutional validity of petitioner's sentence follows a fortiori. See *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring) (Eighth Amendment review should take "full account" of *Rummel* and *Davis*). Certainly, *Rummel*, *Davis*, *Harmelin*, *Graham*, and *McDonald* do not support an affirmative inference of "gross disproportionality" in petitioner's sentence.

c. Petitioner relies heavily upon *Solem* v. *Helm*, *supra*, for that purpose, but the reliance is misplaced. In *Helm*, the defendant had passed a bad check for $100 and previously had been convicted of "six non-violent felonies": three third-degree burglaries that, it appears, did not involve entry into homes; obtaining money by false pretenses; grand larceny by fraud; and driving while drunk. 463 U.S. at 279-281. The judge exercised his discretion to sentence Helm to prison for life without the possibility of parole. *Id.* at 279-281. This Court found the sentence to be cruel and unusual. *Id.* at 303.

The Court took care, however, to distinguish Helm's case from *Rummel* on its facts. 463 U.S. at 288 n.13, 301-302, 303 n. 32. The Court emphasized that Helm's new bad-check offense was "one of the most passive a person could commit," involving an amount that would not even have supported a felony offense under state law if he had stolen the money directly. In addition, the Court made the judgment that, with respect to the prior offenses, "all were nonviolent and none was a crime against a person." *Id.* at 296-297. The Court also distinguished Helm's punishment from Rummel's, concluding that Helm's life sentence was "far more severe" because it contained no possibility of parole. *Id.* at 297, 300-303.

Helm's ways of distinguishing *Rummel*, however, generally do not apply either to petitioner's offenses, old or new, or to his sentence in this case. Petitioner indeed stole goods, from the presence of the storekeeper, the value of which was three times higher than the amount required to classify the theft as a felony. In addition, petitioner's prior "strikes" were for felonies that, even considered in the abstract, necessarily presented a palpable threat of violence and/or were aimed at the person. In the actual event, of course; petitioner committed night-time residential burglaries with victims present and at risk, and he robbed one victim with a knife.

A further, critical distinction between petitioner's case and *Helm* lies in the fact that, once his felony conviction and the "strikes" findings were sustained by the court's discretionary rulings, petitioner's life-with-parole sentence became a mandatory one, fixed by the Legislature itself and confirmed by a popular vote of the people. By contrast, not only did the judge in *Helm* exercise his discretion in choosing the length of Helm's sentence, he did so in an extraordinary way. The *Helm* Court observed that there was no indication "that any habitual offender other than Helm ha[d] ever been given the maximum sentence on the basis of comparable crimes." 463 U.S. at 299. This Court has recognized that more deference is due in the review of sentences that have been mandated by the state legislature. See *Harmelin*, 501 U.S. at 1006-1007 (Kennedy, J., concurring) ("To set aside petitioner's mandatory sentence would require rejection not of the judgment of a single jurist, as in *Helm*, but rather the collective wisdom of the Michigan Legislature and, as a consequence, the Michigan citizenry."); *Helm*, 463 U.S. at 299 n.26.

This Court's own prior applications of the Cruel and Unusual Punishments Clause, then, provide no basis for an affirmative inference of "gross disproportionality" in this

case. They serve, instead, as the basis for the opposite conclusion—that petitioner's sentence in this case is constitutional.[4/]

2. The essential components of California's "Three Strikes" law ensure the proportionality of sentences imposed under it.

Basic, objective characteristics of a California "Three Strikes" sentence also support the conclusion that the sentence in this case does not give rise to an inference of "gross disproportionality." Most important, petitioner was sentenced as a felony recidivist with a record of crimes that not only are traditionally "classified and classifiable" as

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[4/] As noted in Judge Sneed's dissenting opinion in *Andrade* v. *Attorney General of the State of California*, 270 F.3d at 770 n. 1, no other federal court of appeals after *Harmelin* has rejected a felony-recidivist prison sentence as cruel and unusual. And, notwithstanding the recent and unjustified forays by the Ninth Circuit in *Andrade* and in *Brown* v. *Mayle*, 283 F.3d 1019 (9th Cir. 2002), other federal courts of appeals before and after *Harmelin* have upheld comparable lengthy sentences in circumstances similar to those in this case. See *Hutto* v. *Weber*, 275 F.3d 682 (8th Cir. 2001) (eighty-five-year recidivist sentence for burglary and aiding escape); *Smallwood* v. *Johnson*, 73 F.3d 1343, 1345 (5th Cir. 1996) (fifty-year recidivist sentence for shoplifting with prior burglary and drug-possession); *Bocian* v. *Godinez*, 101 F.3d 465, 472 (7th Cir. 1996) (fifty-five year prison term for two counts of residential burglary and related offenses); *McGruder* v. *Puckett*, 954 F.2d 313 (5th Cir. 1992) (life-without-parole sentence for automobile burglary conviction following convictions for armed robbery, burglary, escape, and robbery); *Alford* v. *Rolfs*, 867 F.2d 1216 (9th Cir. 1989) (life sentence for possession of stolen property with priors for possessing drugs, selling heroin, and forgery); *Chandler* v. *Jones*, 813 F.2d 773 (6th Cir. 1987) (life with parole sentence for third non-violent felony of commercial burglary); *Griffin* v. *Warden*, 517 F.2d 756 (4th Cir. 1975) (life imprisonment for grand larceny following breaking-and-entering and residential burglary convictions).

felonies, see *Rummel*, 445 U.S. at 274, but that include felonies falling within a narrowed subclass of crimes of increased seriousness—here, burglary and robbery offenses inherently posing a threat of violence. These objective factors help establish the "seriousness" of petitioner's criminal conduct. Further, the prison sentences required by the "Three Strikes" law, although long, do not irrevocably deprive felony recidivists of their liberty. Here, petitioner received a non-capital sentence holding out a possibility of release, in this case by the eventual opportunity for parole. See *Harmelim*, 501 U.S. at 1000 (Kennedy, J., concurring) ("[t]he most prominent objective factor is the type of punishment imposed"). Finally, the "Three Strikes" scheme allows the sentencing judge to exercise discretion so as to avoid a life sentence in appropriate cases.

Judicial deference to the legislative sentence choices embodied in the California scheme strikes a proper balance between the legislature's historically broad policymaking authority and the judiciary's essential but limited authority to intervene in the "exceedingly rare" case. See *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring). Such deference in a case like this is underwritten by assurances, provided by objective historical and empirical factors, that even very lengthy prison sentences represent a rational penological choice for felony recidivists with records of serious or violent felonies. See *id.* at 1003, 1004. Deference premised upon a state's adoption of sentences that work within the objective boundaries set out by the "Three Strikes" law also minimizes the acknowledged risk of mere judicial second-guessing of the legislative line-drawing involved in what is in essence a question of degree. See *Harmelin*, at 1000. Given the objective features of the "Three Strikes" law, the field will have been sufficiently circumscribed so that no punishments within its boundaries should be condemned by a court as "grossly disproportionate" and unconstitutional.

a. Enhancement of sentences for recidivism is a longstanding and empirically-justified practice that warrants heightened judicial deference.

This is, primarily, a case about felony recidivism. And the recidivist sentencing scheme employed here is supported by history, common sense, and—as in *Harmelin*—empirical experience as well. 501 U.S. at 1002-1003 (Kennedy, J., concurring).

i. As noted earlier, this Court has repeatedly recognized the validity of greatly enhanced sentences for repeat violations of the law. *Parke* v. *Raley*, 506 U.S. at 26-28; *Rummel*, 445 U.S. at 275, 284; *Spencer* v. *Texas*, 385 U.S. at 560; *Gryger* v. *Burke*, 334 U.S. at 732; *Graham*, 224 U.S. at 630-631; *Moore* v. *Missouri*, 159 U.S. at 676-678. The state's interest in deterring and incapacitating such repeat felony offenders is "valid" and perhaps even "overwhelming." See *Helm*, at 297; *Davis*, 454 U.S. at 383 (Brennan, J., dissenting); *Rummel*, 445 U.S. at 276, 278, 284-285; cf. *Atkins* v. *Virginia*, 122 S. Ct. 2242, 2243 (2002) (death penalty for mentally retarded not justified by retribution or deterrence rationales).

A state legislature may conclude that convicted felons with a track record of prior serious or violent felonies are not only more blameworthy than those who have committed just one crime but also pose a special continuing threat to society requiring a tougher policy of incapacitation and deterrence. See *Rummel*, 445 U.S. at 285; see also *Schall* v. *Martin*, 467 U.S. 253, 278 & n. 30 (1984). Such a view is more than natural intuition and common sense. For example, a classic longitudinal study of males showed that chronic offenders comprising six percent of the study group committed more than three-fifths of the group's homicides and aggravated assaults, and approximately three quarters of its robberies and

rapes. M. WOLFGANG, R. FIGLIO & T. SELLIN, DELINQUENCY IN A BIRTH COHORT (Chicago, 1972).

Further empirical experience in California supports the view that, as in this case, the "Three Strikes" law's range of punishment of repeat felony offenses is a rational response to the continued recidivism of a criminal who already had committed other serious or violent felonies. The United States Department of Justice reported, on the basis of a survey of 108,580 prisoners released from prison in eleven states in 1983, that 22.7 percent were re-arrested for a violent offense within three years; that nearly one-fifth of released property or public-order offenders were re-arrested in that time period for violent crimes; and that "[t]he more extensive a prisoner's prior arrest record, the higher the rate of r[illegible]ivism." U.S. DEPT. OF JUSTICE, BUREAU OF JUST[illegible] STATISTICS, "RECIDIVISM OF PRISONERS RELEASED IN 1983," 1-2, 6 (April 1989); see H. R. REP. No. 98-1073, at 1, 3 (1984); S. REP. No. 98-190, at 5 (1983); B. Janiskee & E. Erler, *Crime, Punishment, and Romero: An Analysis of the Case Against California's Three Strikes Law*, 39 DUQ. L. REV. Rev. 43, 51 & n. 43 (2000); J. Ardaiz, *California's Three Strikes Law: History, Expectations, Consequences*, 32 MCGEORGE L. REV. 1, 7-9 (2000).

A Rand study, prepared for the National Institute of Justice and based upon a survey of 2,190 prison and jail inmates in California, Michigan, and Texas, showed that California inmates had self-reported offense rates much higher than levels, ranging as high as an average of twenty crimes per year, reflected in previous studies. For example, a majority of California inmates convicted of robbery reported committing an average of fifty-three robberies and ninety burglaries per year; and almost four out of ten convicted of theft reported committing forty-one burglaries and three robberies per year. RAND CORP., SELECTIVE INCAPACITATION 43-47 (1982). The highest-rate offenders

accounted for a greatly disproportionate number of the reported crimes, but even the typical inmate—the "median"—reported committing fifteen crimes per year. See RAND CORP., VARIETIES OF CRIMINAL BEHAVIOR: SUMMARY AND POLICY IMPLICATIONS, Table A-15 (1982).

In addition, a 1994 Rand Corporation study estimated that, in terms of FBI Index categories, "the typical high rate offender commits seven serious crimes per year, including two violent ones," and "the typical low rate offender commits one serious crime every two-and-a-half years." RAND CORP., THREE STRIKES AND YOU'RE OUT: ESTIMATED BENEFITS OF CALIFORNIA'S NEW MANDATORY SENTENCING LAW, 18 (1994). In light of those data, the study concluded that "over the next 25 years, the . . . three-strikes law will reduce the annual number of serious crimes in California 28 per cent on average below the number that would have been committed under the previous law." *Id.*

There is, therefore, a rational empirical basis for discerning a connection between renewed recidivism in felons who in the past had committed serious or violent crimes and the threat that they will commit many additional serious offenses in the future. This basis is analogous to the one upon which Justice Kennedy relied in *Harmelin* as a reason to validate the harsher life-without-parole sentence meted out to a defendant guilty of one-time possession of one-and-one-half pounds of cocaine. 501 U.S. at 1002-1003. In that Michigan case, Justice Kennedy's opinion cited studies indicating that high percentages of those arrested for homicides, assaults, robberies, and weapons-offenses had at least "*tested positive* for illegal drugs" and that, in the previous year, "60 percent of the homicides in Detroit were drug related, primarily *cocaine related*." *Id.* at 1003 (emphasis added).

It might be true that not every serious or violent felon who re-offends has committed or will commit many other serious crimes, just as it is true that "testing positive" for cocaine

upon arrest for a violent crime does not prove that cocaine actually played any role in the arrest offense. Indeed, the dissenting Justices in *Harmelin* argued that the defendant had been convicted only of simple possession of the cocaine, without formal proof of any intent to distribute it to others, and that the "ripple effect" of societal consequences from drugs is often not the direct result of "possession" but of "addiction" instead. 501 U.S. at 1022-1023 (White, J., dissenting). Nevertheless, Justices Kennedy, O'Connor, and Souter correctly concluded that the studies had "demonstrated a direct nexus between illegal drugs and crimes of violence." 501 U.S. at 1003.

ii. When a sentence is based upon felony recidivism connected to serious or violent crimes, the force of the principles that generally dictate judicial deference to legislative sentencing policies is at its apex. The new crime is aggravated by the defendant's moral culpability, resistance to rehabilitation, and risk to the community. Judicial review of the legislature's judgment on these matters is more complicated and more problematic than even the unadorned task of re-evaluating the bare "proportionality" of the sentence for one individual crime in isolation. Deepening the level of judicial review by an order of magnitude—to re-calibrate not just the weight of one crime but the weight of the recidivism dynamic—would force courts to make decisions practically indistinguishable from the policymaking of legislators. See *Rummel*, 445 U.S. at 285 ("the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction.").

In *Solem* v. *Helm*, this Court analogized the judiciary's experiences with line-drawing in speedy-trial cases to the legislature's expertise in line-drawing in sentencing. 463 U.S. at 294-295. But the analogy is not a close one; and,

especially in the context of weighing recidivism, it highlights the dissimilarity, rather than any similarity, between the two endeavors. Judicial determinations of speedy-trial claims involve, in essence, retrospective and "functional" inquiries into the length, the reasons, and the results of delay. See *id.* Legislative line-drawing in the fixing of recidivist sentences involves, in contrast, policy determinations about the effects of incarceration on future crime rates and policy choices that properly may emphasize deterrence and incapacitation over rehabilitation. See *Harmelin*, 501 U.S. at 988-989 (op. of Scalia, J.), 999 (Kennedy, J., concurring). It also depends upon day-to-day familiarity with the rate and the effect of certain crimes on the locality and a practical sense of the level of leniency customarily extended by local officials like judges and prosecutors to offenders in the early stages of their offense history. And, not insignificantly, it expresses moral condemnation of the recidivist through the elected representative of the people. A judge or any other thoughtful citizen well might be capable of fixing, in the first instance, a rational prison sentence. But that fact does not suggest that anything would be gained and nothing would be lost, in terms of either legitimacy or expertise, if the court or the individual citizen were to supplant the legislature's view of the matter with their own.

iii. Petitioner's brief provides scant reason to overrule the California Legislature's evaluation—in terms of deterrence of crime, rehabilitation, incapacitation, and condemnation—of the harm caused and threatened by "Three Strikes" recidivists. Petitioner merely assumes, as an initial matter, that a threshold inference of "gross disproportionality" may arise from a comparison between his sentence and the crime of grand theft, without any consideration of the role of felony recidivism. (Pet. Br. 29.) He then asks the loaded question of whether the state's interest in deterring recidivism suffices to "rebut the inference of gross disproportionality" in his case.

(*Id.*) But, if the inference truly is a function of the seriousness of the offense and the severity of the sentence, recidivism logically factors into the determination of the seriousness of the crime in the first place. Given the state's valid interest in deterring recidivism, no inference of disproportionality arises in this case at all.

A similar error in approach exacerbates petitioner's second-guessing of the State Legislature on the issues of the seriousness of his three-strikes recidivist offense and the severity of his sentence. His arguments on these points consist largely of "comparative analyses" of other California statutes and the statutes of other states. Thus, in making an initial evaluation of the severity of his sentence, petitioner undertakes a kind of "interjurisdictional" comparison. He compares the degree by which his sentence exceeded a non-recidivist sentence for grand theft in California with the degree the defendant's sentence in *Rummell* v. *Estelle* exceeded a non-recidivist sentence in Texas. (Pet. Br. 28-29.) Also, in purporting to come to grips with the impact of recidivism in his threshold inquiry into the seriousness of his offenses, petitioner's brief engages in an "intrajurisdictional" analysis emphasizing how his sentence compares with other recidivism-based sentences in California. (Pet. Br. 32-37.)

The most obvious criticism of petitioner's arguments in those respects is that they do not respond to the opinions constituting the majority in *Harmelin*. In particular, Justice Kennedy's concurring opinion made it clear that intra- and interjurisdictional comparisons were appropriate "only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." 501 U.S. at 1005. At that point, such comparisons would become relevant, if at all, only to "validate" a threshold inference anchored in other kinds of "objective evidence." See *id.* at 1000-1001, 1005.

Petitioner's circular reliance upon such comparisons, to both raise the "threshold" inference in the first place and then to corroborate it, therefore begs the question. Worse, an un-anchored, pure-comparison approach like petitioner's would lead inexorably to the conclusion, apparently rejected by a majority of this Court in *Harmelin*, 501 U.S. at 989-990 (Scalia op.), 1000 (Kennedy op.), and in *Davis*, 454 U.S. at 373 at n. 2, and in *Rummel*, 445 U.S. at 281-282, that any state prescribing what is comparatively the most severe punishment for a crime necessarily must be acting unconstitutionally. More telling, petitioner's immediate resort to artificial comparative analyses as a response to the state's asserted interest in deterring and incapacitating repeat offenders betrays the hollow center of his argument—the absence of any persuasive and objective reasons to overrule the penological judgment of the California Legislature. In the absence of such reasons, deference to the legislature must be the rule.

b. Other essential facets of California's recidivist scheme provide guarantees of proportionality.

Several other features of California's scheme make it especially appropriate for the courts to defer to the legislature in reviewing a "Three Strikes" law sentence. The scheme relies upon the traditional classification of certain crimes as felonies; it counts as "strikes" only prior convictions for felonies deemed "serious" or "violent"; it provides for the possibility of parole; and it gives judges discretion to dismiss "strikes" in the interest of justice.

The scheme relies upon traditional felony classifications.

i. The "Three Strikes" law's reliance upon a basic traditional criterion—the distinction between felonies and lesser classes of offenses—helps assure rationality and proportion in a recidivist sentencing scheme because that distinction rests on an independent basis in historical practice and has stood the test of time. In the area of defining crimes, of course, the states enjoy "wide latitude." *Montana* v. *Egelhoff*, 518 U.S. 37, 58 (1996). So it is not surprising that petitioner does not challenge California's power to outlaw and punish his "Three Strikes" crimes of burglary, robbery, and grand theft. Cf. *Robinson* v. *California*, 370 U.S. 660, 667 (1962) (unconstitutional to punish by imprisonment "status" offense of drug addiction). Nor is it surprising that petitioner has never argued that the Constitution somehow prevented the legislature from classifying those offenses as felonies rather than misdemeanors. See *Jones* v. *Helms*, 452 U.S. 412, 422 (1981). In limiting its reach to felonies, California has relied upon a pre-existing classification of certain offenses as felonies that developed slowly and thoughtfully from enactment of the Penal Code in 1872 to modern times—for policy reasons independent of fixing "Three Strikes" recidivist sentences. Cf. *Pennsylvania* v. *McMillan*, 477 U.S. 79, 89 (1986).

ii. Petitioner suggests that any reliance in this case upon the classification of grand theft as a felony is undermined by the fact that grand theft in California—as with many other offenses—sometimes might ultimately be deemed a misdemeanor in an individual case. Such an argument, however, is a non sequitur. Grand theft is ordinarily and presumptively a felony: it is punishable by imprisonment in the state prison and thus meets California's statutory definition of a felony. Cal. Penal Code § 17(a); see §§ 484, 486, 488, 490. It is true that a grand theft of property valued

in excess of $400 might become a misdemeanor subsequent to certain specified circumstances occurring later in court—e.g., if the prosecutor charges the offense as a misdemeanor or the court punishes it as one. *Id.* § 17(b). But, for valid reasons, see p. 35, *post*, nothing like that occurred in petitioner's case. Petitioner's grand theft was charged as a felony, and the trial court denied petitioner's motion to punish it as a misdemeanor. So petitioner's offense at all times retained its status as a felony. *In re Anderson*, 69 Cal. 2d 613, 664 & n. 16, 73 Cal. Rptr. 21, 447 P. 2d 117 (1968); *Doble* v. *Superior Court*, 197 Cal. 556, 576-577, 241 P. 852 (1925); *People* v. *Stanfil*, 76 Cal. App. 4th 1137, 1144-1145, 90 Cal. Rptr. 2d 885 (1999); see Cal. Penal Code § 667(d)(1) (referring to sentencing that "automatically *converts* the felony into a misdemeanor") (emphasis added); see also *People* v. *Statum*, __ Cal. 4th __, 2002 WL 167752 (July 25, 2002).

Nor does the mere fact that many California felonies can be reduced to misdemeanors suggest that the Legislature deems such offenses to be minor or trivial (Pet. Br. 25), or that it feels "ambivalent" about them (FAMM Br. 10). The state's purpose in providing a mechanism for converting some felonies to misdemeanors is, instead, to encourage rehabilitation and to allow for some leniency based upon individual circumstances. *In re Anderson*, 69 Cal. 2d at 664 & n. 16; *Necochea* v. *Superior Court*, 23 Cal. App. 3d 1012, 1016, 100 Cal. Rptr. 693 (1972). There is nothing "ambivalent" about the Legislature's view of such offenses: it has not retreated from its determination that grand theft—or any other current felony that might be converted into a misdemeanor—always may be punished as a felony by imprisonment in the state prison. Indeed, a felony later reducible to a misdemeanor might carry a state-prison term exceeding that prescribed for a non-reducible "straight"

felony.[5/] Among such felonies that might later become misdemeanors are many that no reasonable person could deem minor or trivial—for example, possession of deadly weapon with intent to use it to intimidate a trial witness, Cal. Penal Code § 136.5; vehicular manslaughter, § 193(c)(1); drunk-driving manslaughter, § 193(c)(3); shooting a missile at a passenger train or vessel, § 219.2; assault with a deadly weapon, firearm, or by means of force likely to produce great bodily injury, § 245(a)(1)-(2); shooting at a dwelling or occupied building, § 246; and child abuse likely to produce great bodily harm or death, § 273a.

iii. The mechanism for converting felonies into misdemeanors is indeed significant under the Eighth Amendment, but not in the way petitioner suggests. Instead, it helps assure proportionality because it provides an opportunity to ameliorate or avoid "Three Strikes" punishment in an individual case warranting it. See pp. 33-34, *post*. It could hardly exacerbate a risk of constitutional violation. Nor would it make sense, in service of the Cruel and Unusual Punishments Clause, to discourage lenity either by ignoring or denigrating a state's decision to place an offense presumptively within the class of felonies—or by seizing upon the flexibility a state has accorded its judges for the defendant's benefit as a reason to open its sentencing

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[5/] *Compare* Cal. Penal Code § 193(c)(1) (vehicular manslaughter), § 193(c)(3) (drunk-driving manslaughter), § 245(a)(1)-(3) (assault with firearm or force likely to produce great bodily injury), § 246 (shooting at inhabited house), § 273a (child abuse likely to produce great bodily harm or death), § 273d (wilful infliction of injury causing traumatic condition in a child), § 452 (starting forest fire causing bodily injury) *with* § 18 (default felony-sentence range), § 38 (misprision of treason), § 110 (facilitating prison escape), § 151 (successfully advocating death of peace officer with intent to kill), § 213(b) (attempted robbery), § 266f (selling person for immoral purposes), § 451 (arson of property).

scheme to an Eighth Amendment attack as to which it otherwise would have been immune.

iv. Petitioner strenuously asserts that his newest felony was not violent or inherently dangerous. (Pet. Br. 9, 24-27.) But the state's interest in dealing with repeat felons is not necessarily limited to violence or threats to safety. See *Rummel*, 445 U.S. at 275, 284-285. Besides, larceny traditionally has been deemed an offense regarding breach of the peace rather than the protection of property. "The unauthorized taking of property, even by stealth, from the owner's possession is apt to produce an altercation if the owner discovers the property moving out of his possession into the hands of the thief." W. LAFAVE & A. SCOTT, 2 SUBSTANTIVE CRIMINAL LAW § 8.1 (1986). Grand theft thus is not "one of the most passive" kinds of crime. Cf. *Helm*, 463 U.S. at 296. Nor is it a victimless or strict-liability crime. Cf. *Weems* v. *United States*, 217 U.S. at 363. It is not a crime one commits accidently by negligence or recklessness, but instead is one requiring specific intent to steal. See *Helm*, at 293. Of further significance, grand theft is not a "trivial offense," or a *malum prohibidum* offense, like overtime parking. Cf. *Harmelin*, 501 U.S. at 963 (op. of Scalia, J.). "Grand theft" of personal property in excess of $400 has been deemed a felony in California, under general penal laws devised independent of special recidivist provisions, since 1982.[6/]

[6/] Perhaps tacitly acknowledging that the inference is too weak, petitioner relegates to a footnote his feint at portraying his "Three Strikes" sentence as the impermissible result of "double counting" his prior felonies both to elevate his $1,200 theft from a misdemeanor and then to impose enhanced felony-triggered recidivist punishment. (Pet. Br. 25-26 at n. 13.) As explained in the text above, however, petitioner's grand theft was a felony ab initio on account of the value of the goods stolen, irrespective of his prior convictions. Petitioner's criminal record, in any event, extended well beyond the current felony and the two prior felony

Only serious or violent felonies count as prior strikes.

i. Petitioner in effect asks this Court, in reviewing his sentence, to focus myopically on his theft offense in isolation. (Pet. Br. 31-32; see FAMM Br. 6-8.) Given serious or violent prior convictions, however, even an initial focus on a repeat offender's newest conviction necessarily must take account of the special evil of his recidivism. Anyway, the quality of the most-recent offense is by no means the only focus of the constitutional inquiry. Cf. *Helm*, 463 U.S. at 296-297 & n. 21. This Court's precedents make it clear that Eighth Amendment review of a sentence also must take account of the defendant's larger record of prior-crimes and not just his most recent offense. *Id.*; *Rummel*, 445 U.S. at 276; *Hutto* v. *Davis*, 454 U.S. at 372 & n. 1 (per curiam), 379-380 (Powell, J., concurring); see *Harmelin*, at 1002 (Kennedy, J., concurring).

In California, the Legislature has taken a narrowed aim at felony recidivists, and then has narrowed that aim further by predicating "Three Strikes" punishment upon a record that includes "serious" or "violent" prior felony convictions. As may be seen from the descriptions of these offenses, p. 2, n. 1, *ante*, "serious" and "violent" felonies are generally defined in terms of great violence, or obvious threat of such violence, against the person. Narrowing the class of recidivists subject to the "Three Strikes" law serves Eighth Amendment values. Cf. *Arave* v. *Creech*, 507 U.S. 463, 470-476 (1993)

"strikes" necessary for "Three Strikes" punishment. Beyond those "strikes," petitioner's record included three other felonies, numerous misdemeanors, and apparent failed rehabilitation opportunities on probation, in local jails, and in state prison. Even if "double counting" were unconstitutional, a proposition petitioner does not advance, there obviously was no need to "double count" anything in order to impose petitioner's sentence in this case.

(narrowing class of death-penalty-eligible killers, required by Eighth Amendment, sufficient where "not all" are included).

ii. In this case, petitioner's "Three Strikes" record is one of grand theft with prior serious or violent convictions for robbery and multiple residential burglaries. The seriousness of the crime of robbery of a person, see Cal. Penal Code § 211, cannot be gainsaid. And both this Court and Congress have recognized the inherent potential for harm to persons posed by burglaries like the residential burglaries that count as "strikes" under the "Three Strikes" law and that in fact were committed by petitioner in the case at bar. *Taylor* v. *United States*, 495 U.S. 575, 581, 588, 598 (1990) (generic burglary as a "violent felony" under Armed Career Criminal Act of 1984); *Brown* v. *Mayle*, 283 F.3d at 1034 ("residential burglary" is a "violent felony" under the Act); see Cal. Penal Code §§ 459-460.

The three-strikes sentence allows an opportunity for parole.

i. The qualitative difference between a life prison term offering no possibility of future release and one that does is a significant one in assessing the severity of punishment for purposes of Eighth Amendment proportionality review. See *Helm*, 463 U.S. at 297; *Rummel*, 445 U.S. at 281; see also *Harmelin*, 501 U.S. at 1028 (Stevens, J., dissenting) (life-without-parole imprisonment is like a death sentence in the apparently irreversible loss of freedom and rejection of rehabilitation). Where a prison sentence affords a possibility of release after a period of years, moreover, it becomes especially unlikely that objective factors can clearly dictate the precise line of demarcation when the duration of the ultimate sentence might become "disproportionate." As recognized in Justice Kennedy's opinion in *Harmelin*, "[O]ur decisions recognize that we lack clear objective standards to

distinguish between sentences of different terms of years." 451 U.S. at 1000-1001.[7/] When a state may impose a term of years upon a defendant for a felony offense, cf. *Robinson* v. *California*, 370 U.S. at 667, a sentence of imprisonment short of life without parole should ordinarily be upheld.

ii. It is far from clear that petitioner would be retained in prison beyond his minimum twenty-five year sentence, although respondent acknowledges that there are no guarantees and much might depend upon petitioner's own conduct in prison. As provided in the California Penal Code,

> One year prior to the inmate's minimum eligible parole release date, a panel consisting of at least two commissioners of the Board of Prison Terms shall . . . meet with the inmate and *shall normally set a release date* . . . . The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates. The board shall establish criteria for the setting of parole release dates and in so doing shall consider the number of victims for the crime for which the prisoner was sentenced and other factors in aggravation or in mitigation of the crime.

Cal. Penal Code § 3041(a). Further, "[t]he panel or board shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and

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[7/] Indeed, several federal courts of appeals have concluded that a prison sentence allowing a felon a possibility of release may be upheld under the Eighth Amendment without any further scrutiny. *United States* v. *Thomas*, 49 F.3d 253, 261 (9th Cir 1995); *United States* v. *D'Anjou*, 16 F.3d 604, 612 (4th Cir. 1994); *Chandler* v. *Jones*, 813 F.2d at 779; see *Moreno* v. *Estelle*, 717 F.2d 171, 180-181 (5th Cir. 1983).

gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration . . . ." § 3041(b).

Under the Board's published regulations, the general guidelines that would inform any decision deeming an inmate "unsuitable" for parole on account of the inmate's pre-imprisonment criminal record speak of circumstances such as whether the commitment offense was committed in a "heinous, atrocious, or cruel manner," whether "multiple victims attacked, injured, or killed," whether the victim was "abused, defiled, or mutilated," whether the crime showed an "exceptionally callous regard for human suffering," whether "the motive was inexplicable or very trivial in relation to the offense," and whether "[t]he prisoner on previous occasions inflicted or attempted to inflict serious bodily injury on a victim . . ." Title 15, California Code of Regulations, § 2281. Certainly, the state would have little incentive to bear the costs of retaining petitioner in prison, beyond the twenty-five year statutory minimum, for any improper reasons unrelated to his rehabilitation.

The amicus curiae brief in support of petitioner asserts that relatively few California inmates are recommended for parole each year. (FAMM Br. 18.) That extra-record allegation cannot be referring to prisoners incarcerated under the "Three Strikes" law, for none could have served his minimum term since the law's enactment in 1994. As the brief does not identify the types of offenders who are said to have been denied parole, respondent assumes that the amicus means to refer to the Board of Prison Term's and the Governor's past practices with respect to prisoners who have committed crimes like murder, torture, and kidnaping—offenses that carried life sentences in California

long before the passage of "Three Strikes."[8/] Those crimes by their nature implicate the criteria, cited above, that would tend to work against an early grant of parole. There is no reason to suppose that "Three Strikes" defendants like petitioner will fare as poorly as murderers under the parole standards.

The statute preserves an opportunity for judicial discretion to avoid a life sentence.

i. Although its prescribed prison sentences become mandatory upon a new felony conviction and judicially-sustained findings of two prior "strikes"—as respondent has explained, see p. 15, *ante*—the California "Three Strikes" law nevertheless allows the judge an opportunity to make certain determinations, preliminary to the actual calculation and imposition of sentence, that well might operate in an individual case either to avoid the mandatory life-with-possibility-of-parole sentence or to make available a sentence re-calculated in a downward direction. As authoritatively interpreted by the California Supreme Court in *People* v. *Superior Court (Romero)*, 13 Cal. 4th at 529-532, the "Three Strikes" law affords a sentencing court guided discretion to "strike" prior-conviction findings, and in that way avoid what

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[8/] The Penal Code provides life-with-possibility-of-parole sentences for crimes such as first- and second-degree murder, §§ 187(a), 189, 190(a)-(d), 190.03, 190.05, 190.25; attempted murder, §§ 664(a), (e), 187, 189; recidivist drunk-driving vehicular manslaughter, § 191.5(d); aggravated mayhem, § 205; torture, § 206; kidnap for ransom, robbery or sex, § 209(a)-(b); carjack-kidnaping, § 209.5; gang carjacking and gang home-invasion robbery, §§ 186.22(b)(4), 211, 213(a)(1)(A), 215; train-wrecking, §§ 218-219; aggravated sex assault upon a child, § 269; child abuse causing death, § 273ab; aggravated arson, § 451.5; aggravated sexual assault, § 667.61(b); habitual criminal with great bodily injury, §§ 667.7(a)(1); habitual sex offender, § 667.71; explosion with intent to murder or cause great bodily injury, § 123.10(a)-(b); gang shooting from a vehicle causing great bodily injury or death, § 12022.55.

otherwise would then become a mandatory third-felony life sentence.

The existence of this initial discretion to consider individualized circumstances in the defendant's favor, although not required by the Eighth Amendment in a non-capital case, *Harmelin*, 501 U.S. at 994-996, nevertheless serves to ameliorate the "Three Strikes" scheme. In that way, it provides an added guarantee that a "Three Strikes" sentence will not be "grossly disproportionate." See *Harmelin,* at 1008 ("Prosecutorial discretion before sentencing and executive or legislative clemency afterwards provide means for the state to avert of correct unjust sentences.") (Kennedy, J., concurring); *Rummel*, 445 U.S. at 281 ("It is a matter of common knowledge that prosecutors often exercise their discretion in invoking recidivist statutes . . . . so as to screen out truly 'petty' offenders who fall within the literal terms of such statutes."); see also Cal. Const., art. V, § 8 (executive clemency); Cal. Penal Code §§ 4800 et seq. (same).

ii. Here, of course, the trial judge indeed considered petitioner's motions to sentence his felony as if it were a misdemeanor and to "strike" one or more of the prior-felony findings. On the former question, the judge's discretion is broad and encompasses "individualized consideration of the offense, the offender, and the public interest"; and there is no "presumption" against reducing a qualifying felony to a misdemeanor in a "Three Strikes" case. *People* v. *Superior Court (Alvarez)*, 14 Cal. 4th at 977-980. On the separate question of dismissing "strikes" in "the furtherance of justice," see Cal. Penal Code § 1385(a), the judge's discretion encompasses consideration of "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part." *People* v. *Williams*, 17 Cal. 4th 148, 161, 69 Cal. Rptr. 2d

917, 948 P. 2d 429 (1998). The state courts, needless to say, faithfully carry out their obligation to exercise this discretion. E.g., *People* v. *Superior Court (Alvarez)*, 14 Cal. 4th at 980-981; *People* v. *Cluff*, 87 Cal. App. 4th 99, 1001-1004, 105 Cal. Rptr. 2d 80 (Ct. of App. 2001); *People* v. *Taylor,* 80 Cal. App. 4th 804, 813-818, 95 Cal. Rptr. 2d 357 (Ct. of App. 2000), review granted on other grounds, 6 P. 3d 668 (2000); *People* v. *Benevides*, 64 Cal. App. 4th 728, 735 n. 7, 75 Cal. Rptr. 2d 388 (Ct. of App. 1998); *People* v. *Bishop*, 56 Cal. App. 4th 1245, 1247-1251, 66 Cal. Rptr. 2d 347 (Ct. of App. 1997); *People* v. *Vessell*, 36 Cal. App. 4th 288, 297, 42 Cal. Rptr. 2d 241 (Ct. of App. 1995).

In petitioner's trial, the judge in her discretion decided not to reduce the felony or to dismiss any strikes. She relied, in particular, on petitioner's record of persistent criminal activity prior to his Long Beach "strikes" and his commission of the grand-theft felony so soon after being released from prison. J.A. 13-14. And the California Court of Appeal upheld the judge's decision as a valid exercise of the discretion afforded to her under state law. App. to Pet. for Cert. 25-28.

c. The essential components of California's "Three Strikes" law produced a proportionate sentence in petitioner's case.

Petitioner's life sentence promises the possibility of parole. It rests upon a foundation of not just one new felony, but two prior "serious" or "violent" felonies as well. Petitioner has demonstrated a propensity to commit serious and violence-related crimes, and he now has committed yet another felony that signals his insistence upon remaining on the wrong side of felony law. See *Rummel*, 445 U.S. at 283-285. Indeed, even apart from the qualifying convictions necessary to his "Three Strikes" sentence, his record comprises fifteen years of chronic recidivism including other

burglaries of elevated seriousness, another grand-theft conviction, eight misdemeanor convictions, and failed efforts at rehabilitation on probation and parole. Although state law allowed the judge discretion to ameliorate petitioner's sentence, the circumstances of petitioner's case did not warrant it.

Petitioner's sentence therefore is a proportionate one. In any event, as confirmed by a review of the above-described features of the "Three Strikes" law as they were applied in his case, his sentence certainly is not "extreme" and "grossly disproportionate."

C. Although intra- and interjurisdictional comparisons regarding petitioner's sentence are unnecessary and inappropriate, such comparisons in this case would lend no support to petitioner's constitutional attack anyway.

Because petitioner's sentence is not "grossly disproportionate" to his crime, no intra- or interjurisdictional comparisons regarding his sentence are necessary. Nor are such comparisons ever really appropriate. As argued above, see pp. 17, 21, *ante*, it is problematic for a court to scrutinize, in competition with the legislature, the relative seriousness of individual crimes and, even less tenable, to re-assess the weight assignable to the evil of felony recidivism. That task becomes even more complex and precarious when a court attempts to equate the varied bases and justifications for recidivist or non-recidivist sentences within a state and across the Nation, and to compare myriad statutory provisions in "complex matrices." In our federal system different states are allowed to pursue different penological goals given different local conditions. *Harmelin*, 501 U.S. at 989 (op. of Scalia, J.), 998-999 (Kennedy, J., concurring). The anti-legislative and anti-federalism risk implicated by such judicial scrutiny

counsels, at the least, prudent restrictions on the scope and the use intra- and interjurisdictional comparisons as a means of overriding legislative choices.

Here, even if the Court were to undertake the intrajurisdictional and interjurisdictional comparisons, petitioner's "Three Strikes" sentence in this case still should stand. Cf. *Solem* v. *Helm*, 463 U.S. at 311 n. 3 (Burger, C.J., dissenting) (deference unless reasonable persons could not differ as to inappropriateness of a punishment).

1. An intrajurisdictional analysis discloses no meaningful disparities wrought by the "Three Strikes" law.

a. Intrajurisdictional comparisons, if undertaken at all, should be limited to determining whether the challenged sentence is so aberrational as to represent a manifest or virtual malfunction of the legislature's intended sentencing scheme. The origin of intrajurisdictional comparisons may be traced to *Weems* v. *United States*, 217 U.S. 349, which suggests the limits of their usefulness. In *Weems*, a case arising from the Philippines, this Court compared the lengthy, painful, and unusual punishment of *cadena* for the offense of making a false entry in an official record with other punishments prescribed for similar offenses by Congress and the United States Philippine Commission. *Id.* at 380-381. But *cadena* was literally a foreign interloper that had "no fellow in American legislation" and that "amaze[d] those who . . . formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths." *Id.* at 365-366, 377. It was prescribed by "the Penal Code of Spain," *id.* at 363, which was "in nominal existence" when the Americans arrived in the Philippines and which was allowed to continue in operation by what inferably was an emergency "military order"; as the Court suggested,

"[i]t may be there was not and could not be a careful consideration of its provisions and a determination to what extent they accorded with" American legal principles. *Id.* at 368. As an artifact of the Spanish monarchy, *cadena* illustrated "the difference between unreserved power and that which is exercised under the spirit of constitutional limitations." *Id.* at 381. It therefore could be adjudged an extreme aberration that contradicted the spirit and intended operation of the pertinent legislature's plan.

Similarly, in *Solem* v. *Helm*, the Court's intrajurisdictional analysis turned up the distinct possibility that the individual judge had exercised his discretion to impose a life-without-parole sentence even though no "habitual offender other than Helm has ever been given the maximum sentence on the basis of comparable crimes." 463 U.S. at 299. The Court therefore inferred that, under the state's law, recidivists like the defendant ordinarily would receive more lenient treatment than the life sentence "generally" reserved for other types of recidivists. *Id.*; see also *Enmund* v. *Florida*, 458 U.S. 782, 795-796 (1982) (lone state defendant sentenced to death for felony murder as non-killer with no intent to kill); *Furman* v. *Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) (punishment unconstitutional when imposition is freakish like being "struck by lightning"). There can be little doubt that, despite petitioner's allegations of anomalies in California's sentencing provisions, the California Legislature intended the challenged operations of its "Three Strikes" law and that, as petitioner points out, the law indeed has been applied to many recidivists with new offenses like petitioner's. (Pet. Br. 23.)[9/]

[9/] That does not mean that most of those incarcerated under the "Three Strikes" law had committed new theft or "property" offenses. (Pet. Br. 22-23.) To the contrary, recent statistics show that third-strikers in prison in California include 294 for murder, 34 for manslaughter, 1,408 for robbery, 356 for assault with a deadly weapon, 416 for other assaults or battery, 136 for rape, 241 for lewd act upon a child, 136 for other sex offenses, 83 for kidnaping, 776 for residential burglary, 288 for possession of drugs for sale, 191 for sale of drugs, 28 for manufacturing drugs, 356 for weapons-possession, and 25 for arson. See CAL. DEPT. OF CORRECTIONS, SECOND AND THIRD STRIKERS IN THE INSTITUTIONAL POPULATION, Table 1(Mar. 31, 2002).

b. Beyond its capacity to aid in identifying such malfunctions of the legislature's intended system, intrajurisdictional analysis logically can reveal little more than mere asymmetry in a state's punishment scheme. Given the fits-and-starts, backing-and-filling nature of the legislative process over time, asymmetry should hardly raise a constitutional red flag. The legislature rationally may deal with social problems in such fashion. See *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring) ("strict" proportionality not required); see also *Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483, 489 (1955).

Thus, petitioner's complaint that his three-strikes punishment would not have been triggered if he had committed his crimes in a different sequence (Pet. Br. 36) discloses no unconstitutional infirmity in the California scheme. Moreover, it is not anomalous to first require the establishment of a track record of multiple serious or violent felonies before drawing a line against the increased threat to the community that becomes apparent when a multiple serious or violent offender thereafter persists in committing more felonies. In contrast, and despite the suggestion in the amicus curiae brief, it would be a strange value system that could celebrate a repeat offender's commission of any new felony as "moving in the *right direction*." (FAMM Br. 8 [emphasis added].)

c. If an intrajurisdictional analysis were undertaken in this case, there would be little reason to compare petitioner's sentence with those prescribed for non-recidivists. In light of the diminished prospects for rehabilitation and diminished reasons for leniency, as well as other reasons to treat repeat offenders differently, recidivists and non-recidivists are not similarly situated. Here, comparing petitioner's sentences with other recidivist-based sentences yields no corroboration for his claim of gross disproportionality.

Under the "Three Strikes" law, the applicable third-strike term increases depending upon the sentence ordinarily prescribed for the current crime and upon whether the defendant is subject to other sentencing enhancements. For example, if a third-strike defendant's new conviction ordinarily could be punishable by a maximum term of nine years rather than the three-years maximum for grand theft—e.g., Cal. Penal Code § 182 (conspiracy to commit crime against the person), § 193 (voluntary manslaughter), § 213 (robbery of dwelling in concert), § 215 (carjacking), § 269 (aggravated sexual assault on a child), § 451 (arson causing great bodily injury), § 12022.3 (use of firearm in committing specified felonies); Cal. Health & Safety Code § 11353.5 (selling drugs to children at school)—the judge may select that term as the appropriate one. The "Three Strikes" law then would operate to triple that term, for a sentence of twenty-seven years to life. *Id.* § 667(e)(2)(A)(i). That minimum term itself will be increased further for qualifying prior convictions. E.g., *id.* § 667(a) (five-year enhancement), § 667.5(b) (one year for prior prison term). Indeed, given the added five-year-per-prior-conviction enhancement provided by section 667(a) of the California Penal Code, a third-strike defendant with a new conviction for a "serious" or "violent" felony will always be subject to a greater sentence than a third-striker whose new felony is not

"serious" or "violent." See *People* v. *Dotson*, 16 Cal. 4th 547, 555-559, 66 Cal. Rptr. 2d 423, 941 P. 2d 56 (1997).

Similarly, the minimum term for a life sentence imposed on a third-strike defendant convicted of non-capital murder would be either forty-five years or seventy-five years, rather than petitioner's minimum twenty-five-year term. Cal. Penal Code §§ 190(a), 667(e)(2)(A)(i). And, under an available "Three Strikes" law calculation based upon ordinary sentence-enhancing factors, a first-degree non-capital murderer who used a firearm in the killing would receive a total sentence of at least 110 years in prison as a third-strike defendant. *Id.* §§ 190(a), 667(a), 667(e)(2)(A)(i), 12022.53(d). A felon with two prior "strikes" who commits second-degree robbery with the firing of a gun would receive a minimum indeterminate term of thirty-five years to life, plus thirty more years in sentence enhancements. *Id.* §§ 213, 667(a), 667(e), 12022.53. So, it is incorrect to say (see Pet. Br. 42) that the "Three Strikes" law is a "one size fits all" scheme that does not take into account the nature of the newest conviction.

Petitioner, in the same vein, says that his recidivism "enhancement" is drastically disproportionate to the one-year and three-year enhancements imposed for use of a weapon in committing a felony. (Pet. Br. 33-34.) But petitioner ignores some lengthy firearm-use enhancements provided by section 12022.53 of the California Penal Code. That provision requires an added ten-years enhancement for using a gun in committing many felonies, twenty years for firing the gun, and twenty-five years to life for wounding with it. And other California sentencing schemes provide for life terms comparable to those provided in the "Three Strikes" scheme. E.g., Cal. Penal Code §§ 667.61, 667.7, 667.71 (sex offenses and offenders).

Petitioner also says that other state-law recidivist enhancements "maintain a discernable proportional relationship" between the recidivism punishment and the ordinary non-recidivism punishment for the new offense. (Pet. Br. 41-42.) Upon closer inspection, it appears that petitioner means merely that some California statutes add a certain number of years to the normal sentence for each prior offense, and that a "two strikes" sentence doubles the ordinary sentence. (*Id.*) The proposed principle, however, seems illusory. Insofar as a state might add a number of years for each prior conviction, there would appear to be no mathematical relationship between the total of the enhancements and the new triggering offense at all; further, there would appear to be no mathematical restriction if the state decided to drastically increase the length of such enhancements themselves. Similarly, there appears to be no reason inherent in the suggested "discernable proportional relationship" principle that would prevent a state from punishing a new repeat offense by a three-striker by a multiplier of more than three. Respondent notes that, in *Rummel*, this Court upheld the life-imprisonment sentence upon a new offense that otherwise would have carried a sentence of two-to-ten years. 445 U.S. at 266. Again, as observed in *Harmelin*, courts "lack clear objective standards to distinguish between sentences of different terms of years." 451 U.S. at 1000-1001 (Kennedy, J., concurring).

The amicus brief filed in support of petitioner likewise suggests that recidivist punishment must be proportionate only to the new offense, without regard to recidivism, lest the defendant's right against double jeopardy be infringed. (FAMM Br. 7.) But this Court has recognized that the proportionality of recidivist punishment is a function of the defendant's broader record, *Helm*, at 296-297 & n. 21; *Rummel*, at 285; that recidivist punishment is generally consistent with the Double Jeopardy Clause, *Parke* v. *Raley*,

506 U.S. at 26-28; *Spencer* v. *Texas*, 385 U.S. at 560; and that double-jeopardy rights are not violated where a sentence taking into account other criminal activity is within the statutory maximum, see *Witte* v. *United States*, 515 U.S. 389, 404 (1995).

2. An interjurisdictional analysis shows that California's "Three Strikes" law produces results sufficiently similar to that of a significant number of other states.

California's "Three Strikes" law and petitioner's sentence, finally, comport with the law and modern trends in the laws of the other states.

a. Grand theft, the crime for which petitioner was convicted as a "third-striker," has traditionally been "classifiable and classified" as a felony. See *Rummel*, 445 U.S. at 268-269, 274. Though defined in somewhat different ways across the country, it is typically a felony in virtually all fifty states and typically carries a punishment of significant time in prison in excess of a year. See *Atkins* v. *Virginia*, 122 S. Ct. at 2247 (state legislatures are best expositors of contemporary standards); Appendix B. Petitioner's grand theft of property worth $1,200, moreover, would be a felony in almost all other American jurisdictions. Appendix B. Grand theft involving that amount—even without consideration of recidivism—is punishable by as much as ten years in prison in thirteen others states and, in five of those states, by as much as fourteen, fifteen, or twenty years. *Id.* California's grand-theft cutoff amount of $400 is itself in the mainstream, in that approximately one-half of the states consider theft of property in the range of $200 to $500 to be a felony subject to significant imprisonment, very often well in excess of one year. *Id.*

b. More important, as many as twenty-four other states in the last decade have enacted similar laws broadening the class of new offenses that trigger pre-existing recidivist provisions, expanding the definition of prior offenses serving as a predicate for enhanced recidivist punishment, and increasing the lengths of recidivist sentences themselves. NATIONAL INSTITUTE OF JUSTICE, "'THREE STRIKES AND YOU'RE OUT': A REVIEW OF STATE LEGISLATION," 7-9 (September 1997). The adoption of "Three Strikes"-type legislation in these states indicates a broad and contemporary consensus approving the notion of greatly increased prison terms for felony recidivists. See *Atkins* v. *Virginia*, 122 S. Ct. at 2247. This re-confirmation is not only "dramatic," but also significant in "the consistency of the direction" of the overall trend, see *id.* at 2423—toward longer prison sentences for felony recidivists.

c. In addition, it appears that legislation in six other states also would permit or require life sentences, literal or in effect, comparable to petitioner's on the basis of his "Three Strikes" law offenses: Alabama (mandatory term of twenty-years or life); Montana (mandatory term of ten-to-100 years); Nevada (mandatory term of life-without parole, ten-years-to-life, or twenty-five-years-to-life); Oklahoma (punishable by term of four-years to life); South Dakota (mandatory life imprisonment); and Vermont (punishable by imprisonment "up to and including life").[10/] Indeed, given petitioner's 1984 grand theft conviction in Ohio, J.A. 4; see Ohio Rev. Code

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[10/] See Ala. Code §§ 13A-8-3, 13A-5-6, 13A-5-9; Mont. Code Ann. §§ 45-6-301, 46-18-501, 46-18-502; Nev. Rev. Stat. §§ 193.130, 205.060(4), 205.0832, 205.0835, 207.010, 207.012; Okla. Stats. tit. 21, §§ 51.1, 1701-1705; S.D. Cod. Laws, §§ 22-1-2, 22-6-1, 22-7-9, 22-30A-1, 22-30A-17; Vt. Stats. Ann. tit. 13, §§ 11, 2501; see also Ark. Code §§ 5-36-103, 5-4-401, 5-4-501 (three to thirty years); La. Rev. Stat. Ann. §§ 14:67.10, 529.1(A)(1)(c)(i) (six to twenty years); Mo. Ann. Stat. §§ 558.011, 558.016 (twenty years).

Ann. § 2913.02, petitioner also would be subject to a life sentences under the laws of Idaho (mandatory term of five-years to life) and West Virginia (mandatory life term).[11/] Similar to California, the statutes of South Dakota and West Virginia would have made a life sentence mandatory. In addition, the recidivist statute in effect in Louisiana at the time of petitioner's latest felony would have required a life sentence too.[12/]

[11/] Id. Code § 19-2514; W. Va. Code §§ 61-3-13, 61-11-18. Although West Virginia courts may invoke the state's constitution to refuse to enforce the life sentence mandated by the legislature, it would be merely speculative to conclude that petitioner's record would be deemed insufficient by the courts in that state. See *State* v. *Evans*, 203 W. Va. 446, 450, 508 S.E.2d 606, 610 (W. Va. 1998); *State* v. *Housden*, 184 W. Va. 171, 174, 399 S.E.2d 882, 884-886 (W. Va. 1990); but see *State* v. *Miller*, 184 W. Va. 462, 400 S.E.2d 897 (1990).

[12/] La. Rev. Stat. Ann. § 15.529.1 (2000). Although it is true that Louisiana in 2001 amended its recidivist statute so that a court today would not impose a life sentence for a defendant with a record similar to petitioner's (Pet. Br. 49), the amending legislation itself provided that the change in the provision "shall only have prospective effect." La. Acts 2001, No. 403, §§ 2, 6. So, regardless of the change in the law and the reasons for it, the Louisiana Legislature continues to endorses mandatory life terms for defendant like petitioner, whose sentences remain governed by the prior law and operative under it. See *Atkins* v. *Virginia*, 122 S. Ct. at 2261-2262 (Scalia, J., dissenting); *State* v. *Jackson*, 812 So. 2d 139, 144-148 (La. Ct. of App. 2002).

Petitioner says that Louisiana courts would have subjected his legislatively-mandated sentence to scrutiny under that state's constitution. (Pet. Br. 50 n. 29.) But the cases he cites, *State* v. *Hayes*, 739 So. 2d 301 (La. Ct. of App. 1999), and *State* v. *Burns*, 723 So.2d 1013 (La. Ct. of App. 1998), do not support a conclusion that the state courts would have overturned petitioner's sentence in the circumstances of this case. Those cases involved life-without-parole sentences; and they were cases in which individual characteristics of the defendant, beyond the absence of violence in the defendant's record, tipped the scales in the courts' estimation. The pre-1998 cases cited in the amicus brief in support of

Respondent, of course, does not claim that California's recidivist law represents the mean. If the true aim of interjurisdictional analysis is to determine whether a sentence is "grossly disproportionate," the court should not focus on the degree to which petitioner's sentence might depart from the norm but only upon whether it is beyond the ken. Here, interjurisdictional analysis does not show California's law to be so extreme in comparison with the laws of the other states as to validate any inference of "gross disproportionality." It shows, if anything, that the "Three Strikes" law's life-with-possibility-of-parole term is reasonably similar to the prison terms, especially the maximums, allowed or mandated by the legislatures in approximately fifteen to twenty percent of the states.

c. Nor should judicial scrutiny involve analysis of myriad details of sentencing practices varying across the states. See *Harmelin*, 501 U.S. at 1004-1005 ("'a reviewing court rarely will be required to engage in extended analysis to determine that a sentenee is not constitutionally disproportionate.'") (Kennedy, J., concurring.) Nuances such as transitory parole practices, for example, would not significantly alter a state legislature's fundamental approval of a prison sentence like petitioner's based at its core upon a similar series of offenses. The same logically may be said about credits a defendant might earn against his sentence by his rehabilitative conduct well after his crime and the pronouncement of sentence.

In *Atkins* v. *Virginia*, for example, this Court found noteworthy the general thrust of recently-enacted state laws specifically prohibiting the execution of mentally retarded killers. It did not inquire into any potential consensus among

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petitioner (FAMM Br. 24-25 & n. 21) seem to have become obsolete in light of the Louisiana Supreme Court's later clarifications restricting the scope of judicial scrutiny. See *State* v. *Lindsey*, 770 So.2d 339, 342 (La. 2000); *State* v. *Johnson*, 709 So. 2d 672, 676-678 (La. 1998).

the states with respect to the precise combination of details comprising their various definitions of mental retardation itself; in refraining from providing more than general guidance on that subject, the Court signaled to the states that they would be allowed latitude to work out such details for themselves in the federal system. 122 S. Ct. at 2250 & n. 22. As indicated in *Rummel*, there is a high level of impracticality in attempting comparisons across the many "complex matrices" that comprise the sentencing features in the laws of any set of states. 445 U.S. at 280. In the end, differences in such matrices between California's scheme and those of the other states cited by respondent are merely "subtle" rather than "gross." See *id.* at 279.

Although his brief elsewhere ignores minimum terms when they do not suit his argument (Pet. Br. 10), petitioner notes differences between the minimum term imposed under the "Three Strikes" law and lower minimum terms associated with the recidivist sentences respondent has ascribed to some of the other states providing for life sentences in circumstances like petitioner's (*id.* at 48-52.)[13/] See *Rummel*, at 281. But the most important point of comparison should be the maximum terms deemed appropriate by the state legislatures; the fact that the legislation of other states might provide for minimum terms less than California's does not detract from the fact that the cited state legislatures nevertheless have approved life sentences for recidivists in petitioner's circumstances. Moreover, just as respondent has acknowledged that there are no guarantees about petitioner's release on parole, see p. 31, *ante*, petitioner does not show

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[13/] Petitioner says that his hypothetical counterpart would be eligible for parole after ten years if sentenced to life imprisonment in Alabama; that there would be no minimum term in South Dakota; that he would be eligible for parole after six months in Vermont; and that the minimum term in Oklahoma would be four years. (Pet. Br. 48-53.)

that defendants like him would serve only the minimum term, or anything close to it, in other states. See *id.* at 280 ("We agree with Rummel that his inability to enforce any right to parole precludes us from from treating his life sentence as if it were equivalent to a sentence of 12 years.").

Anyway, petitioner's argument in this regard, while playing up hypothetical possibilities of lesser sentences in other states, ignores that he also had an opportunity under the "Three Strikes" law in this case to seek dismissal, in the court's guided discretion, of one or more of his "strikes" and a reduction of the status of his grand-theft offense from a felony to a misdemeanor. These California sentencing options could have produced lesser sentences sufficiently equivalent to the minimum terms emphasized by petitioner in his discussion of the sentencing laws of the other states.

d. One cannot plausibly maintain that, to the extent other states' recidivist schemes differ from California's, there has developed a consensus specifically repudiating California's approach as intolerable. Thus, in *Atkins*, other states had recently changed their death-penalty laws for the specific purpose of shielding the mentally retarded from capital punishment. Here, in contrast, there is no evidence that many other states have now changed their recidivist laws with the specific purpose of differentiating them from California's in the respects that petitioner here challenges. Nor could one confidently infer, from a state's fixing of a prison sentence at one level, that it meant to voice actual condemnation of fixing it, as a matter of degree, at any other level.

e. Finally, the fact that California's law might be harsher than those of other states could not by itself mean that it is "grossly disproportionate" and unconstitutional. *Harmelin*, 501 U.S. at 990 (Scalia, J.), 1000 (Kennedy, J.); *Rummel*, 445 U.S. at 281-282. Given the deference due to the legislature's judgment on the problem of felony recidivism, the essential features of the "Three Strikes" law that help guarantee the

reasonableness and proportionality of its recidivist sentencing scheme, its harmony with other state sentencing provisions, and its general kinship with the approach of other states in dealing with the problem of recidivism, there are no grounds for invalidating petitioner's sentence as "grossly disproportionate." His sentence is constitutional.

CONCLUSION

The judgment of the California Court of Appeal should be affirmed.

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Respectfully submitted,

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APPENDIX A

Pertinent provisions of sections 667.5 and 1192.7 of the California Penal Code

Section 667.5 defines "violent" felonies as follows:

(c) For the purpose of this section, "violent felony" shall mean any of the following:

(1) Murder or voluntary manslaughter.
(2) Mayhem.
(3) Rape as defined in paragraph (2) or (6) of subdivision (a) of Section 261 or paragraph (1) or (4) of subdivision (a) of Section 262.
(4) Sodomy by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.
(5) Oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.
(6) Lewd acts on a child under the age of 14 years as defined in Section 288.
(7) Any felony punishable by death or imprisonment in the state prison for life.
(8) Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7 or 12022.9 on or after July 1, 1977, or as specified prior to July 1, 1977, in Sections 213, 264, and 461, or any felony in which the defendant uses a firearm which use has been charged and proved as provided in Section 12022.5, or 12022.55.
(9) Any robbery.

(10) Arson, in violation of subdivision (a) or (b) of Section 451.
(11) The offense defined in subdivision (a) of Section 289 where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.
(12) Attempted murder.
(13) A violation of Section 12308, 12309, or 12310.
(14) Kidnapping.
(15) Assault with the intent to commit mayhem, rape, sodomy, or oral copulation, in violation of Section 220.
(16) Continuous sexual abuse of a child, in violation of Section 288.5.
(17) Carjacking, as defined in subdivision (a) of Section 215.
(18) A violation of Section 264.1.
(19) Extortion, as defined in Section 518, which would constitute a felony violation of Section 186.22 of the Penal Code.
(20) Threats to victims or witnesses, as defined in Section 136.1, which would constitute a felony violation of Section 186.22 of the Penal Code.
(21) Any burglary of the first degree, as defined in subdivision (a) of Section 460, wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary.
(22) Any violation of Section 12022.53.
The Legislature finds and declares that these specified crimes merit special consideration when imposing a sentence to display society's condemnation for these extraordinary crimes of violence against the person.

Section 1192.7 defines "serious" felonies as follows:

(c) As used in this section, "serious felony" means any of the following:

(1) Murder or voluntary manslaughter; (2) mayhem; (3) rape; (4) sodomy by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (5) oral copulation by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (6) lewd or lascivious act on a child under the age of 14 years; (7) any felony punishable by death or imprisonment in the state prison for life; (8) any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm; (9) attempted murder; (10) assault with intent to commit rape or robbery; (11) assault with a deadly weapon or instrument on a peace officer; (12) assault by a life prisoner on a noninmate; (13) assault with a deadly weapon by an inmate; (14) arson; (15) exploding a destructive device or any explosive with intent to injure; (16) exploding a destructive device or any explosive causing bodily injury, great bodily injury, or mayhem; (17) exploding a destructive device or any explosive with intent to murder; (18) any burglary of the first degree; (19) robbery or bank robbery; (20) kidnapping; (21) holding of a hostage by a person confined in a state prison; (22) attempt to commit a felony punishable by death or imprisonment in the state prison for life; (23) any felony in which the defendant personally used a dangerous or deadly weapon; (24) selling, furnishing, administering, giving, or offering to sell, furnish, administer, or give to a minor any heroin, cocaine, phencyclidine (PCP), or any methamphetamine-related drug, as described in paragraph (2)

of subdivision (d) of Section 11055 of the Health and Safety Code, or any of the precursors of methamphetamines, as described in subparagraph (A) of paragraph (1) of subdivision (f) of Section 11055 or subdivision (a) of Section 11100 of the Health and Safety Code; (25) any violation of subdivision (a) of Section 289 where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person; (26) grand theft involving a firearm; (27) carjacking; (28) any felony offense, which would also constitute a felony violation of Section 186.22; (29) assault with the intent to commit mayhem, rape, sodomy, or oral copulation, in violation of Section 220; (30) throwing acid or flammable substances, in violation of Section 244; (31) assault with a deadly weapon, firearm, machine gun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of Section 245; (32) assault with a deadly weapon against a public transit employee, custodial officer, or school employee, in violation of Sections 245.2, 245.3, or 245.5; (33) discharge of a firearm at an inhabited dwelling, vehicle, or aircraft, in violation of Section 246; (34) commission of rape or penetration by a foreign object in concert with another person, in violation of Section 264.1; (35) continuous sexual abuse of a child, in violation of Section 288.5; (36) shooting from a vehicle, in violation of subdivision (c) or (d) of Section 12034; (37) intimidation of victims or witnesses, in violation of Section 136.1; (38) terrorist threats, in violation Section 422; (39) any attempt to commit a crime listed in this subdivision other than an assault; (40) any violation of Section 12022.53; and (41) any conspiracy to commit an offense described in this subdivision.

APPENDIX B

State Felony-Theft Statutes and Prescribed Punishments

Alabama. Ala. Code §§ 13A-5-6, 13A-8-3, 13A-8-4 (Class B felony if property exceeds $1000, punishable by 2-to-20 years imprisonment. Class C felony at $250 level, punishable by 1-to-10 years).

Alaska. Alaska Stats. §§ 11.46.100, 11.46.130, 12.55.125(e) (Class C felony if property exceeds $500, punishable by up to five years).

Arizona. Ariz. Rev. Stats. §§ 13-604, 13-702, 13-802 (Class 5 felony if property exceeds $1000; 9 months to two years in prison. Class 6 felony for property of $250-$1000, punishable by six months to one and one-half years).

Arkansas. Ark. Code §§ 536-103, 5-4-401 (Class C felony if property exceeds $500; 3-to-10 years).

Colorado. Colo. Rev. Stats. § 18-4-401 (Class 4 felony if property exceeds $500; 2-to-6 years).

Connecticut. Conn. Gen. Stats. §§ 53a-119, 53a-124 (Class D felony if property exceeds $1000; 1-to-5 years).

Delaware. Del. Code. Ann. § 841 (Class G felony if property exceeds $1000; up to two years imprisonment).

District of Columbia. D.C. Code Ann. §§ 22-3211, 22-3212 (first-degree theft if property exceeds $250; up to ten years).

Florida. Fla. Stat. Ann. §§ 775.082, 812.014 (third-degree grand theft if property exceeds $300, up to five years).

Georgia. Ga. Code Ann. § 16-8-2 (if property exceeds $500; 1-to-10 years (or as misdemeanor)).

Hawaii. Haw. Rev. Stats. §§ 706-660, 708-830, 708-831 (Class C felony if property exceeds $300; up to five years).

Idaho. Idaho Code §§ 18-204, 18-207, 18-208 (grand theft if property exceeds $1000; 1-to-14 years).

Illinois. 720 Ill. Comp. Stats. 5/16-1, 5/5-8-1 (Class 3 felony if property exceeds $300; 2-to-5 years).

Indiana. Ind. Code §§ 35-43-4-2, 35-50-2-7 (Class D felony if property under $100,000; 6 months to three years).

Iowa. Iowa Code §§ 714.1, 714.2 (Class D felony if property exceeds $1000; up to five years).

Kansas. Kan. Stat. Ann. § 21-3701 (non-person felony theft, severity level 7, if property exceeds $500).

Kentucky. Ky. Rev. Stats. Ann. §§ 514.030, 532.020, 532.060 (Class D felony if property exceeds $300; 1-to-5 years).

Louisiana. La. Rev. Stats. Ann. § 14:67.10 (theft, punishable by up to 10 years if property exceeds $500).

Maine. Me. Rev. Stats. Ann., tit. 17-a, §§ 353, 362, 1252 (Class C crime if property exceeds $1000, up to 5 years).

Maryland. Md. Code Ann., art.27, §§ 341-342 (felony theft if property exceeds $500, up to 15 years).

Massachusetts. Mass. Gen. Laws, ch. 266, § 30 (larceny, punishable up to five years if property exceeds $250).

Michigan. Mich. Comp. Laws Ann. § 750.356 (felony larceny punishable by no more than 5 years if property exceeds $1000).

Minnesota. Minn. Stats. § 609.52 (theft, punishable by maximum of 5 years if property exceeds $500).

Mississippi. Miss. Code Ann. § 97-17-41 (grand larceny if property exceeds $250; up to 5 years).

Missouri. Mo. Ann. Stats. § 570.030 (Class C felony if property exceeds $750, no more than 7 years).

Montana. Mont. Code. Ann. § 45-6-301 (if property exceeds $1000, 10 years maximum).

Nebraska. Neb. Rev. Stats. §§ 28-510, 28-511, 28-518 (Class IV felony if property exceeds $500; five years maximum).

Nevada. Nev. Rev. Stats. §§ 205.0832, 205.0835 (Category C felony if property exceeds $250; 1-to-5 years).

New Hampshire. N.H. Rev. Stats. Ann. §§ 637:3, 637:11, 651:2 (Class A felony if property exceeds $1000, 15 years maximum. Class B felony at $500-$1000, punishable by up to seven years).

New Jersey. N.J. Stats. Ann. §§ 2C:20-2, 2C:43-6 (third-degree theft if property exceeds $500; 3-to-5 years).

New Mexico. N.M. Stats. Ann. §§30-16-1, 31-18-15 (fourth-degree felony if property exceeds $250; 1.5 years).

New York. N.Y. Pen. Law §§ 155.05, 155.030, 155.035, 155.070 (grand larceny, Class E felony, if property exceeds $1000; up to 4 years).

North Carolina. N.C. Gen. Stats. §§ 14-70, 14-72 (Class H felony if property exceeds $1000 (4-to-25 months).

North Dakota. N.D. Cent. Code §§ 12.1-23-01, 12.1-23.02, 12.1-23-05 (Class C felony if property exceeds $500; 5 years maximum).

Ohio. Ohio Rev. Code Ann. §§ 2913.02, 2929.14 (fifth-degree felony if property exceeds $500 (6 months to 1 year).

Oklahoma. Okla. Stats., tit. 21, §§ 1701, 1703, 1704 (grand larceny if property exceeds $500; 5 years maximum).

Oregon. Or. Rev. Stats. §§ 164.055, 164.065 (Class C felony if property exceeds $750; 5 years maximum).

Pennsylvania. Pa. Cons. Stats. Ann., tit. 18, §§ 3903, 3921 (first-degree *misdemeanor*; 5 years).

Rhode Island. R.I. Gen. Laws §§ 11-41-1, 11-41-5 (if property exceeds $500, 10 years maximum).

South Carolina. S.C. Code Ann. § 16-13-30 (grand larceny if property exceeds $1000; 5 years maximum).

South Dakota. S.D. Cod. Laws §§ 22-6-1, 22-30A-1, 22-30A-17 (Class 4 felony grand theft if property exceeds $500; 10 years maximum).

Tennessee. Tenn. Code Ann. §§ 39-14-103, 39-14-105, 40-35-102, 40-35-111 (Class D felony if property exceeds $1000, punishable by 2-to-4 years. Class E felony at $500-$1000, punishable by 1-to-2 years).

Texas. Tex. Penal Code Ann. §§ 12.21, 31.03 (Class A *misdemeanor* for $500-$1500 property; no more than one year).

Utah. Utah Code Ann. §§ 76-3-203, 76-6-404, 76-6-412 (third-degree felony if property exceeds $1000; 5 years maximum).

Vermont. Vt. Stats. Ann., tit. 13, § 2501 (grand larceny if property exceeds $500; 10 years maximum).

Virginia. Va. Code. Ann. § 18.2.95 (grand larceny if property exceeds $200; less than 12 months in jail or 1-to-20 years in prison).

Washington. Wash. Rev. Code §§ 9A.56.020, 9A.56.040, 9A.56.510, 9A-56-515 (Class C felony if property exceeds $250; up to 29 months in prison).

West Virginia. W.Va. Code § 61-3-13 (grand larceny if property exceeds $1000 (up to one year in jail or 1-to-10 years in prison).

Wisconsin. Wisc. Stats. § 943.20 (Class A *misdemeanor* if property less than $2500; 9 months maximum).

Wyoming. Wyo. Stats. Ann. § 6-3-403 (if property exceeds $500, 10 years maximum imprisonment).